

JAN 11 1995

CLERK OF THE COURT

No. 94-562

In The

Supreme Court of the United States
October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO., (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (U'K) LTD.,

Petitioners,

versus

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

MICHAEL A. ORLANDO
COUNSEL OF RECORD FOR
PETITIONERS

WERNER A. POWERS
COUNSEL OF RECORD FOR
RESPONDENTS

PATRICK C. APPEL
PAUL LeROY CPST
MEYER ORLANDO & EVANS^{PC}
2300 America Tower
2929 Allen Parkway
Houston, TX 77019
Telephone: 713-523-1101

CHARLES C. KEEBLE, JR.
HAYNES & BOONE^{L.L.P.}
3100 Nationsbank Plaza
901 Main Street
Dallas, TX 75202-3714
Telephone: 214-651-5000

COUNSEL FOR PETITIONERS

COUNSEL FOR RESPONDENTS

Petition For Certiorari Filed September 26, 1994
Certiorari Granted November 28, 1994

TABLE OF CONTENTS

Page

- A. CIVIL DOCKET FOR CAUSE NO. 93-CV-531,
CLOSED AUGUST 5, 1993 FOR APPEAL..... 1-6
- B. ORIGINAL COMPLAINT IN CAUSE NO. 93-
CV-531, FILED FEBRUARY 23, 1993 (Exhibits
omitted in printing).....7-13
- C. DEFENDANTS' MARCH 26, 1993 RULE 12
RESPONSE AND MOTION AND BRIEF TO DIS-
MISS OR TO STAY (Affidavit and attachments
omitted in printing)..... 15-22
- D. ORDER OF JULY 2, 1993 OF THE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
TEXAS STAYING PLAINTIFFS/PETITIONERS'
ACTION (ALSO REPRINTED AS APPENDIX
PAGES B-1 - B-4 OF THE PETITION FOR A
WRIT OF CERTIORARI).....23-26
- E. JUNE 29, 1994 OPINION OF THE COURT OF
APPEALS FOR THE FIFTH CIRCUIT (ALSO
REPRINTED AS APPENDIX PAGES A-1 - A-4
OF THE PETITION FOR A WRIT OF CER-
TIORARI)..... 27-30

CLOSED APPEAL

U.S. District Court
TXS - Southern District of Texas (Houston)

CIVIL DOCKET FOR CASE #: 93-CV-531

Wilton, et al v. Seven
Falls Company, et al
Assigned to: Judge David
Hittner

Filed: 02/23/93

Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Nature of Suit: 110
Jurisdiction: Diversity

Cause: 28:2201 Declaratory
Judgment

LESLIE WILTON, On
behalf of himself and as a
representative of certain
underwriters at Lloyd's of
London and certain
Institute of London
Underwriters Companies
as follows,
plaintiff

Michael A Orlando
[COR LD NTC]
Meyer Orlando & Evans
2929 Allen Pkwy
Ste 2300
Houston, TX 77019
713-523-1101

THE ORION COMPANIES
PLC
plaintiff

Michael A Orlando
(See above)
[COR LD NTC]

SKANDIA U K
INSURANCE PLC
plaintiff

Michael A Orlando
(See above)
[COR LD NTC]

YASUDA FIRE &
MARINE, Insurance
Company of Europe Ltd
plaintiff

OCEAN MARINE
INSURANCE COMPANY
LIMITED
plaintiff

Michael A Orlando
(See above)
[COR LD NTC]

YORKSHIRE INS CO LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
MINSTER INSURANCE CO LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
PRUDENTIAL ASSURANCE, CO LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
PEARL ASSURANCE PLC plaintiff	Michael A Orlando (See above) [COR LD NTC]
BISHOPSGATE INSURANCE LIMITED plaintiff	Michael A Orlando (See above) [COR LD NTC]
HANSA MARINE INS CO, (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
VESTA (UK) INSURANCE COMPANY LIMITED plaintiff	Michael A Orlando (See above) [COR LD NTC]
NORTHERN ASSURANCE COMPANY LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
CORNHILL INSURANCE COMPANY LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
SIRIUS INSURANCE CO (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LIMITED plaintiff	Michael A Orlando (See above) [COR LD NTC]

TOKIO MARINE & FIRE, INSURANCE (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
TAISHO MARINE & FIRE INSURANCE CO (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
STOREBRAND INSURANCE CO (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
ATLANTIC MUTUAL INSURANCE CO plaintiff	Michael A Orlando (See above) [COR LD NTC]
ALLIANZ INTERNATIONAL INSURANCE CO LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
WAUSAU INSURANCE CO (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
v.	
SEVEN FALLS COMPANY defendant	Werner A Powers [COR LD NTC] Haynes & Boone 901 Main Ste 3100 Dallas, TX 75202-3714 214 651 5000
MARGARET HUNT HILL defendant	Werner A Powers (See above) [COR LD NTC]
A G HILL, Estate of defendant	Werner A Powers (See above) [COR LD NTC]

LYDA HILL defendant	Werner A Powers (See above) [COR LD NTC]
ALINDA H WIKERT defendant	Werner A Powers (See above) [COR LD NTC]
U S FINANCIAL CORP defendant	Werner A Powers (See above) [COR LD NTC]

2/23/93 1 COMPLAINT filed; FILING FEE \$ 120
RECEIPT # 0133 (ad) [Entry date
02/25/93]

2/23/93 -- SUMMONS issued for Seven Falls Com-
pany, Margaret Hunt Hill, A G Hill, Lyda
Hill, Alinda H Wikert, U S Financial Corp
(ad) [Entry date 02/25/93] [Edit date
03/01/93]

2/23/93 2 ORDER, set scheduling conference for
11:00 6/22/93, entered; Parties notified.
(signed by Judge David Hittner) (ad)
[Entry date 02/25/93]

3/26/93 3 ANSWER to Complaint by Seven Falls
Company, Margaret Hunt Hill, A G Hill,
Lyda Hill, Alinda H Wikert, U S Financial
Corp (Added attorney Werner A Powers),
filed. (mh) [Entry date 03/29/93]

3/26/93 3 MOTION to dismiss, or to stay by Seven
Falls Company, Margaret Hunt Hill, A G
Hill, Lyda Hill, Alinda H Wikert, U S
Financial Corp, Motion Docket Date

4/15/93 [3-1] motion, 4/15/93 [3-2]
motion, filed (mh) [Entry date 03/29/93]

3/26/93 4 AFFIDAVIT of Charles C. Keeble, Jr., Re:
[3-1] motion to dismiss, [3-2] motion to
stay, filed (mh) [Entry date 03/29/93]

4/15/93 5 MEMORANDUM w/affidavit by Plain-
tiffs, Leslie Wilton, et al, in opposition to
defendants' [3-1] motion to dismiss, [3-2]
motion to stay, filed (la) [Entry date
04/16/93]

4/22/93 6 REPLY by Seven Falls Company, Margaret
Hunt Hill, A G Hill, Lyda Hill, Alinda H
Wikert, U S Financial Corp in support of
rule 12 response and [3-1] motion and
brief to dismiss, [3-2] motion and brief to
stay, filed. (la) [Entry date 04/23/93]

5/20/93 7 RESPONSE by Leslie Wilton, et al, in
opposition to defendants' [6-1] reply in
support of [3-1] motion to dismiss, filed
(la) [Entry date 05/21/93]

6/1/93 8 ORDER re hearing CTRM 8A, Motion
hearing set for 9:30 a.m. 6/9/93 for [3-1]
motion to dismiss, set for 9:30 a.m. 6/9/93
for [3-2] motion to stay, entered; Parties
notified. (signed by Judge David Hittner)
(la) [Entry date 06/03/93]

6/11/93 9 Motion hearing held before Judge David
Hittner re: [3-1] motion to dismiss Motion
hearing held; [3-2] motion to stay Motion
hearing held; Order to issue; Ct Reporter:

Faris; Appearances: M Orlando f/pltf; C Keeble f/deft (la) [Entry date 06/15/93]

6/30/93 10 ORDER terminating defendant's [sic] [3-1] motion to dismiss; granting defendant's [sic] [3-2] motion to stay; ordering case STAYED pending resolution of Hill, et al v Wilton, et al, No. 93-03542, currently pending in the 299th Judicial District Court of Travis County, Texas, entered; Parties notified. (signed by Judge David Hittner) (la) [Entry date 07/02/93]

6/30/93 -- Case closed (la) [Entry date 07/02/93]

7/29/93 11 NOTICE OF APPEAL of [10-1] order by Leslie Wilton, Orion Companies The, Skandia U K Ins PLC, Yasuda Fire & Marine, Ocean Marine Ins Co, Yorkshire Ins Co Ltd, Minster Ins Co Ltd, Prudential Assurance, Pearl Assurance PLC, Bishopsgate Ins Ltd, Hansa Marine Ins Co, Vesta (UK) Ins Co, Northern Assur Co, Cornhill Ins Co Ltd, Sirius Ins Co (UK), Sovereign Marine &, Tokio Marine & Fire, Taisho Marine & Fire, Storebrand Ins Co, Atlantic Mutual Ins, Allianz Intl Ins Co, Wausau Ins Co (UK), filed. Fee Status: Pd Receipt #: 426514 (bw) [Entry date 08/05/93]

8/5/93 -- Notice of appeal and certified copy of docket transmitted to USCA: [11-1] appeal (bw)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LESLIE WILTON, ON BEHALF OF § (Filed
HIMSELF AND AS A § Feb. 23, 1993)
REPRESENTATIVE OF CERTAIN §
UNDERWRITERS AT LLOYD'S OF §
LONDON, AND CERTAIN §
INSTITUTE OF LONDON §
UNDERWRITERS COMPANIES, AS §
FOLLOWS, THE ORION §
INSURANCE COMPANY, PLC, §
SKANDIA U.K. INSURANCE PLC, §
THE YASUDA FIRE & MARINE §
INSURANCE COMPANY OF §
EUROPE LTD., OCEAN MARINE § H-93-0531
INSURANCE CO., LTD., YORKSHIRE §
INSURANCE CO., LTD., MINSTER §
INSURANCE CO., LTD.[.] §
PRUDENTIAL ASSURANCE CO., §
LTD.[.] PEARL ASSURANCE PLC, §
BISHOPSGATE INSURANCE LTD., §
HANSA MARINE INS. CO. (UK) §
LTD., VESTA (UK) INS. CO. LTD., §
NORTHERN ASSURANCE CO., §
LTD., CORNHILL INSURANCE CO., §
LTD., SIRIUS INSURANCE CO., (UK) §
LTD.[.] SOVEREIGN MARINE & §
GENERAL INSURANCE CO., TOKIO §
MARINE & FIRE INSURANCE (UK) §
LTD., TAISHO MARINE & FIRE §
INSURANCE CO. (UK) LTD., §
STOREBRAND INSURANCE CO. §
(UK) LTD., ATLANTIC MUTUAL §
INSURANCE CO., ALLIANZ §
INTERNATIONAL INSURANCE CO. §
LTD., AND WAUSAU INSURANCE §
CO. (UK) LTD. §

Plaintiffs, C.A. No.

vs.

SEVEN FALLS COMPANY,
MARGARET HUNT HILL, ESTATE
OF A. G. HILL, LYDA HILL,
ALINDA H. WIKERT, AND U.S.
FINANCIAL CORP.

Defendants.

ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE:

Leslie Wilton, on behalf of himself and as a representative of certain Underwriters at Lloyd's of London, and certain Institute of London Underwriters companies, as follows: The Orion Insurance Company, PLC, Skandia U.K. Insurance PLC, The Yasuda Fire & Marine Insurance Company of Europe Ltd., Ocean Marine Insurance Co., Ltd., Yorkshire Insurance Co., Ltd., Minster Insurance Co., Ltd., Prudential Assurance Co., Ltd, Pearl Assurance PLC, Bishopsgate Insurance Ltd., Hansa Marine Ins. Co. (UK) Ltd., Vesta (UK) Ins. Co. Ltd., Northern Assurance Co., Ltd., Cornhill Insurance Co., Ltd., Sirius Insurance Co.,] (UK) Ltd., Sovereign Marine & General Insurance Co. Ltd., Tokio Marine & Fire Insurance (UK) Ltd., Taisho Marine & Fire Insurance Co. (UK) Ltd., Storebrand Insurance Co. (UK) Ltd., Atlantic Mutual Insurance Co., Allianz International Insurance Co. Ltd., and Wausau Insurance Co. (UK) Ltd., all as specified on the attached Exhibit "A," plaintiffs, file this their Original Complaint complaining of Seven Falls Company, Margaret Hunt Hill, Estate of A. G. Hill, Lyda Hill, Alinda H. Wikert, and U.S. Financial Corp., defendants, and for cause of action would respectfully show:

1. Each specified Lloyd's Syndicate and Institute of London Underwriters Company listed on Exhibit "A" is an insurer duly organized and existing under the laws of the United Kingdom. Each has its principal office in or around London, England. Leslie Wilton is an individual who is a resident and citizen of the United Kingdom.

2. Seven Falls Company is a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business in Dallas, Texas. Such defendant may be served through its agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

Margaret Hunt Hill is an individual who is a resident and citizen of the State of Texas. She may be served through her agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

The Estate of A. G. Hill is a duly probated estate within the State of Texas acting through Margaret Hunt Hill as the estate's duly appointed executrix may be served by serving the agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

Lyda Hill is an individual who is a resident and citizen of the State of Texas. She may be served by serving her agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

Alinda H. Wikert is an individual who is a resident and citizen of the State of Texas. She may be served by serving her agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

U.S. Financial Corporation is a corporation duly organized and existing under the laws of the State of Texas with its principal place of business located in Dallas, Texas. Such defendant may be served by serving its agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

3. Jurisdiction is founded on Title 28 U.S.C.A. § 1332 as there is diversity of citizenship between plaintiffs and defendants and the amount in controversy exceeds \$50,000.00.

4. Venue is proper in this judicial district because the insurance policies which are the basis of this proceeding were executed and issued in Houston, Texas.

5. This petition is brought pursuant to Title 28 U.S.C.A. § 2201 and pursuant to Rule 57, Federal Rules of Civil Procedure. Plaintiffs hereby request a speedy hearing. Plaintiffs seek construction of five policies of insurance identified as Certificate Nos. JHB 890172, JHB 890174, JHB 890175, JHB 890176 and JHB 890177. Except for the persons and entities listed as "Named Insureds," each of such policies is identical in all material respects. Copies of each of the five certificates as well as the full policy of insurance for certificate JHB 890172 are attached hereto as Exhibit "B." Plaintiffs, each for their several interests as specified in Exhibit "A," seek a declaration

that the policies of insurance provide no coverage or defense obligations for any of the liabilities related to certain lawsuits pending in Winkler County, Texas and Dallas County, Texas in which the defendants are parties. The subject lawsuits are identified as: Heritage Resources, Inc. et al., vs. A. G. Hill, et al., Cause No. 11,763 consolidated with Cause No. 11,885, styled as Heritage Resources, Inc., et al v. Sherman Hunt, et al., in the 109 Judicial District Court, Winkler County, Texas; and Tribal Drilling, et al. vs. Heritage Resources, Inc., et al., Cause No. 87-16819-A, in the 162nd Judicial District Court of Dallas County, Texas.

6. Plaintiffs have previously sent to defendants letters setting forth the reasons that these policies do not cover the claims being asserted against defendants by the Heritage Group of parties. Those letters are attached hereto as Exhibit "C," and fully incorporated herein. Plaintiffs assert herein the same reasons stated in such letters as the basis for a declaration that there is no coverage under the policies and no duty to defend. In general, there has been no occurrence that would trigger coverage under these policies, nor has there been any bodily injury, property damage, person injury or advertising injury alleged that would fit within the terms and conditions of the policies. Further, in general, there are exclusions that exclude the underlying claims from coverage under the policies and the alleged incidents which are the basis of the underlying claims did not fall within the time frame for coverage under the policies.

7. There has been a trial of the consolidated Winkler County cases and the jury returned a verdict in the total amount of \$83,823,864.00 plus attorney's fees. Further, the

alleged obligations to defend the defendants greatly exceed the minimum jurisdictional requirements of \$50,000.00. The Winkler County district court has entered judgement on the jury verdict for approximately \$66 million plus attorneys fees, interest and costs. A true and correct copy of the judgment against these defendants is attached hereto as Exhibit "D." The Dallas County case is still pending and is set for trial in the spring of 1993. The plaintiffs seek a declaration that none of the five policies of insurance, each with limits of \$1 million, provides coverage or defense obligations to the defendants for the Winkler County judgment or the Dallas County case.

8. All conditions precedent to the filing of this proceeding have been taken or have occurred.

WHEREFORE, plaintiffs request that defendants be summoned to appear and answer and that on final trial plaintiffs have judgment:

1. declaring that the policies identified as Certificate Nos. JHB 890172, JHB 890174, JHB 890175, JHB 890176 and JHB 890177 provide no coverage for the defendants for liabilities relating to judgment entered for the Heritage Group in the Winkler County case or on the counter-claims asserted by the Heritage Group in the Dallas County case;

2. declaring that plaintiffs were not and are not obligated to defend the defendants against the claims asserted in the Dallas County or Winkler County cases;

3. alternatively, declaring, that if there is any coverage of any claims asserted by the Heritage Group against the defendants that such coverage is restricted by the

terms, conditions, warranties, and limits of liability as contained in the subject policies of insurance; and

4. that plaintiff's receive such reasonable attorneys fees and costs incurred in prosecuting this declaratory judgment suit as are allowed by law; and

5. for such other and further relief to which plaintiffs may be justly entitled.

Respectfully submitted,

/s/ Michael A. Orlando

Michael A. Orlando

State Bar No. 15302700

Attorney in Charge for Plaintiffs,
LESLIE WILTON ON BEHALF OF
HIMSELF AND AS REPRESENTA-
TIVE OF CERTAIN UNDERWRI-
TERS AT LLOYD'S OF LONDON
AND CERTAIN MEMBER COM-
PANIES OF THE INSTITUTE OF
LONDON UNDERWRITERS

2300 America Tower

2929 Allen Parkway

Houston, TX 77019

Telephone: (713) 523-1101

Fax: (713) 523-2002

OF COUNSEL:

MEYER ORLANDO & EVANS PC

[Exhibits omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LESLIE WILTON, ON BEHALF	§	
OF HIMSELF AND AS A	§	
REPRESENTATIVE OF CERTAIN	§	
UNDERWRITERS AT LLOYD'S	§	CIVIL ACTION
OF LONDON, AND	§	NO.
CERTAIN INSTITUTE OF	§	
LONDON UNDERWRITERS	§	H-93-0531
COMPANIES, et al.,	§	
Plaintiffs,	§	
v.	§	
SEVEN FALLS COMPANY,	§	
MARGARET HUNT HILL,	§	
ESTATE OF A.G. HILL,	§	
LYDA HILL, ALINDA H.	§	
WIKERT, AND U.S.	§	
FINANCIAL CORP.	§	
Defendants.	§	

DEFENDANTS' RULE 12 RESPONSE AND MOTION
AND BRIEF TO DISMISS OR TO STAY

Defendants Seven Falls Company, Margaret Hunt Hill, Estate of A.G. Hill, Lyda Hill, Alinda H. Wikert and U.S. Financial Corporation file this Rule 12 Response and Motion and Brief to Dismiss or Stay this action and would respectfully show the Court as follows.

I.

FACTS

This insurance coverage dispute arises out of three lawsuits, two of which were consolidated in the District Court of Winkler County, Texas. The third lawsuit is pending in the District Court in Dallas County. In late September, 1992 the consolidated Winkler County suits proceeded to trial. After a three week trial, a verdict in excess of \$100 million was rendered against, among others, the Defendants in this case who are insureds under the five policies of insurance at issue in this action. Plaintiffs (the "Insurers") were given notice of this verdict by Defendants' (the "Insureds' ") counsel in November, 1992. See Affidavit of Charles C. Keeble, Jr. ("Keeble Affidavit") at ¶ 2, Ex. "A". Shortly thereafter, on December 9, 1993, the Insurers instituted Civil Action No. H-92-3749, a suit identical to this one, in this Court. That suit was dismissed without prejudice pursuant to an agreement of counsel which required the Insureds to give ten days notice of their intent to commence any future litigation against the Insurers. See Keeble Affidavit at ¶ 3, Ex. "B". Such notice was given on February 23, 1993. Keeble Affidavit at ¶ 4, Ex. "C". As a result of this notice, the insurers refiled this action.

On March 26, 1993, the Insureds filed an action in state court in Travis County, Texas (the "Travis County Action") against the Insurers. Keeble Affidavit at ¶ 5, Ex. "D". In the Travis County Action, the Insureds assert, *inter alia*, claims for breach of contract, declaratory relief, injunctive relief and breach of the duty of good faith and

fair dealing. These claims arise not only out of the policies at issue in this litigation, but also out of a number of additional policies issued through Lloyd's to the Insureds named as Defendants in this case and to a number of other insureds who are not parties in this case but who are judgment debtors in the Winkler County action and who are plaintiffs seeking coverage in the Travis County action. The Insureds, as the real plaintiffs in this insurance coverage dispute, now request this Court to stay or dismiss this action in deference to the more comprehensive Travis County Action where the claim asserted by the Insurers in this action could be raised as a defense or counterclaim.

A. This Court Should Decline To Exercise Its Discretionary Jurisdiction Over This Declaratory Judgment Action.

This Court's exercise of jurisdiction to grant declaratory relief is discretionary rather than mandatory.¹ *Brillhart v. Excess Ins. of Am.*, 316 U.S. 491, 494 (1942); *Commercial Metals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 264, 266 (5th Cir. 1978); *909 Corp. v. Village of Boling Brook Police Pension Fund*, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990); *Granite State Ins. Co. v. Tandy Corp.*, 762 F. Supp. 156, 157 (S.D. Tex. 1991) *aff'd* 959 F.2d 968, cert. granted 113 S. Ct. 51 (1992). A district court's discretion to grant relief under the Declaratory Judgments Act ordinarily

¹ The purely remedial and equitable nature of a declaratory judgment action sets declaratory judgment actions outside the scope of traditional abstention analysis. See, *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 n. 1 (5th Cir. 1983).

should not be exercised where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. *Brillhart*, 316 U.S. at 495; *Continental Cas. Co. v. Robsac Industries*, 947 F.2d 1367, 70 (9th Cir. 1991) (" . . . when a state court action is pending presenting the same issue of state law as is presented in a federal declaratory suit, there exists a presumption that the entire suit should be heard in state court").

In *Granite*, this Court noted two factors to consider in determining whether to stay or dismiss a federal declaratory judgment action in favor of a pending state court action: (1) whether exercising jurisdiction would encourage piecemeal litigation; and (2) whether the declaratory judgment action was filed as a means of forum shopping. *Granite*, 762 F. Supp. at 157. In *Robsac*, the court noted two additional factors to be considered in determining whether an insurer's federal declaratory judgment action should be stayed or dismissed in favor of a parallel state action: (1) the need to avoid having federal courts needlessly determine issues of state law; and (2) the need to avoid duplicative litigation. *Robsac*, 947 F.2d at 1371. Applying these factors to the case at hand compels the conclusion that the Court should abstain from exercising its jurisdiction in this case.

1. Declining Jurisdiction in this Case Will Avoid Piecemeal Litigation.

A primary consideration in a court's decision to exercise jurisdiction in a declaratory judgment case is whether, due to the pendency of other proceedings, the

court's exercise of jurisdiction will result in the piecemeal adjudication of a dispute. *Granite*, 762 F. Supp. at 157. This Court would avert piecemeal litigation by abstaining from exercising its jurisdiction in this action. The Travis County Action is more comprehensive in the number of policies at issue in the litigation, the number of insureds seeking coverage under the Lloyd's policies and in the claims it presents. Thus, the Travis County Action is more likely to lead to a complete resolution of the parties' dispute.

The complaint in this action seeks only declaratory relief with regard to certain policies issued to the Insureds covering the 1988-1989 period. The Travis County Action seeks declaratory relief, injunctive relief, compensatory and punitive damages and asserts claims under the policies at issue in this action and under a number of policies covering the years beyond 1988-1989. Because the Travis County Action is the more comprehensive action, if this Court decides to exercise its jurisdiction, issues would remain to be litigated in Travis County upon completion of this case. Nor can the Insurers seriously contend that they will be unable to litigate the coverage issues raised by their complaint in the Travis County action if this Court declines to exercise jurisdiction in this case. Thus, the Travis County action is more likely to lead to a complete resolution of the dispute and staying or dismissing this action will avoid piecemeal litigation. See *Robsac*, 947 F.2d at 1373.

2. The Declaratory Judgment Action Before this Court was Filed as a Means of Forum Shopping.

An additional factor which a court may consider in determining whether to exercise jurisdiction in a declaratory judgment action is whether the complaint for declaratory relief was filed in anticipation of the filing of a suit by a defendant in the declaratory action. *Granite*, 762 F. Supp[.] at 157. Based on the timing of the original filing of this action shortly after the Defendants received notice of the verdict in the Winkler County litigation, it is clear that the Insurers' filing of this action was done in anticipation of the filing of suit by their insureds. In such a case, the Court, in the exercise of its discretion, should refuse to exercise jurisdiction. *Robsac*, 947 F.2d at 1371-73 (noting that "whether the [insurer's] federal declaratory judgment action regarding insurance coverage is filed first or second, it is reactive, and permitting it to go forward when there is a pending state court case presenting the identical issue would encourage forum shopping in violation of . . . *Brillhart*. . . "); *Granite*, 762 F. Supp. at 157-58.

3. This Court Can Avoid Needless Determinations of State Law by Declining to Exercise its Jurisdiction in this Case.

The precise state law issues at stake in this action are the subject of the Travis County Action. Texas law provides the rule of decision in both this case and the Travis County Action. Where, as here, the sole basis of jurisdiction is diversity of citizenship, the federal interest is

minimal and the policy of avoiding unnecessary declarations of state law is expecially [sic] strong, *Robsac*, 947 F.2d at 1371.

4. Declining to Exercise Jurisdiction in this Case Would Avoid Duplicative Litigation.

The policy of avoiding duplicative litigation would be frustrated by permitting this action to go forward during the pendency of the state court action as the coverage issues presented in this case can be resolved in the more comprehensive Travis County Action. See generally, *Robsac*, 947 F.2d at 1371-73.

B. Conclusion.

For the reasons set forth herein, this Court should, in the exercise of its discretion, abstain from exercising its jurisdiction in this case.

Respectfully submitted,

/s/ Werner A. Powers
Werner A. Powers
State Bar No. 16218800
Charles C. Keeble, Jr.
State Bar No. 11151010
S. Bradley Rhorer
State Bar No. 16824780

HAYNES AND BOONE, L.L.P.
3100 NationsBank Plaza
901 Main Street
Dallas, Texas 75202
Telephone: (214) 651-5000
Telecopy: (214) 651-5940

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was served on opposing counsel in accordance with the Federal Rules of Civil Procedure on March 26, 1993.

/s/ Charles C. Keeble, Jr.
Charles C. Keeble, Jr.

[Affidavit and attachments omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LESLIE WILTON, On Behalf	§	
of Himself and as a	§	
Representative of Certain	§	CIVIL ACTION
Underwriters at Lloyd's of	§	NO. H-93-531
London, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
SEVEN FALLS COMPANY, et al.,	§	
	§	
Defendants.	§	

O R D E R

[Filed July 2, 1993]

Pending before this Court is a motion to dismiss or to stay (Document #3) filed by defendants Seven Falls Company, Margaret Hunt Hill, Estate of A.G. Hill, Lyda Hill, Alinda H. Wikert, and U.S. Financial Corporation. After having considered the motion, the submissions of the parties, and the applicable law, the Court determines that this action should be stayed.

Plaintiffs Leslie Wilton, on behalf of himself and as a representative of certain Underwriters at Lloyd's of London, and certain Institute of London Underwriters companies filed this action, seeking a declaration of their rights and obligations under five different insurance policies issued to the defendants. *See* Document #1. Plaintiffs have denied coverage and defense obligations under the policies for claims pending against defendants in Winkler

County, Texas and Dallas County, Texas (collectively, the "Heritage Group claims"). See Document #1, Exhibit C.

In September 1992, before this action was filed, the lawsuit pending in Winkler County proceeded to trial, and the court entered a jury verdict against the defendants in excess of \$100 million. Document #3 at 1-2. After receiving notice of the verdict, plaintiffs filed a declaratory judgment suit identical to the present action on December 9, 1992. Document #3 at 2; Document #5 at 2-3. That suit was dismissed without prejudice pursuant to an agreement of counsel which required defendants to give plaintiffs notice of any intent to commence litigation in the future. Document #3 at 2; Document #5 at 3. Such notice was given on February 23, 1993, and plaintiffs filed this action later that day. *Id.* On March 26, 1993, defendants filed a suit in Travis County, Texas, against the plaintiffs for, among other things, breach of contract and breach of the duty of good faith and fair dealing. *Id.* In the instant motion, defendants seek to dismiss or to stay this action pending the conclusion of the related suit in Travis County.

The district court, in its discretion, may provide declaratory relief. *909 Corp. v. Village of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990) (citing *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983)). To determine if declaratory relief is appropriate, the court may consider whether the declaratory judgment action was filed in anticipation of a trial on the same issues in state court. *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 29 (5th Cir. 1989) (citing *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494-5 (1942)); *909 Corp.*, 741 F. Supp. at 1292. The court may also

consider whether granting relief will result in piecemeal litigation. *Granite State Ins. Co. v. Tandy Corp.*, 762 F. Supp. 156, 157 (S.D. Tex. 1991), *aff'd*, 959 F.2d 968 (1992) (citations omitted).

The state court lawsuit pending in Travis County encompasses the coverage issues raised by the plaintiffs in this action. The plaintiffs are already parties to that suit and may assert their claims as defenses or counterclaims. Resolving the plaintiffs' claims in this Court, however, would not dispose of the Travis County suit. Further, when the plaintiffs originally filed this suit in December 1992, they did so in anticipation of litigation after receiving notice of the Winkler County verdict. See *909 Corp.*, 741 F. Supp. at 1292-93 (disallowing forum shopping in the guise of a declaratory judgment action). Thus, the Court finds that exercising jurisdiction to grant declaratory relief would result in the piecemeal adjudication of the plaintiffs' and defendants' coverage dispute and would reward plaintiffs' attempts to forum shop. See Document #4, Exhibits B, C. A stay of these proceedings is therefore appropriate.

Based on the foregoing, the Court

ORDERS that defendants' motion to dismiss or to stay (Document #3) is GRANTED IN PART. This action [is] hereby STAYED pending resolution of *Margaret Hunt Hill, et al. v. Leslie Wilton, et al.*, No. 93-03542, currently pending in the 299th Judicial District Court of Travis County, Texas.

SIGNED at Houston, Texas, on this the 30 day of
June, 1993.

/s/ David Hittner
DAVID HITTNER
United States
District Judge

**UNITED STATES COURT OF APPEALS
for the Fifth Circuit**

No. 93-2608
Summary Calendar

LESLIE WILTON, ETC., ET AL.,

Plaintiffs-Appellants,

VERSUS

SEVEN FALLS COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 93 0531)

[Filed June 29, 1994]

Before GARWOOD, DAVIS, and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:¹

The plaintiffs appeal the district court's order staying this action for declaratory judgment pending resolution of a later-filed state court suit. Because we find that the

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court did not abuse its discretion in staying this action, we affirm.

I.

In October 1992, a verdict in excess of \$100 million was rendered against the appellees and others in suits involving a dispute over the ownership and operation of certain oil and gas properties. Anticipating litigation based on this verdict, in December 1992, the plaintiffs/appellants (collectively "London Underwriters") filed a declaratory judgment action pursuant to 28 U.S.C. § 2201 in the United States District Court for the Southern District of Texas. The appellants sought declaration of their rights and liabilities under several policies of commercial general liability insurance issued to appellees (collectively the "Hill Group"). Counsel for the parties thereafter entered into an agreement whereby London Underwriters agreed to voluntarily dismiss their declaratory judgment action in exchange for the Hill Group's agreement to provide London Underwriters two weeks['] advance notice prior to commencing any litigation against London Underwriters.

In February 1993, the Hill Group notified London Underwriters of their intention to file suit in state court. London Underwriters immediately filed this declaratory judgment action in the Southern District of Texas. In March 1993, the Hill Group filed an action against London Underwriters in state court. At approximately the same time, the Hill Group also filed a Rule 12(b) motion to dismiss or stay the federal declaratory judgment action. The district court granted the appellees's [sic] Rule

12 motion, staying the declaratory judgment action pending resolution of the state court action. London Underwriters appeal.

II.

The district court has broad discretion to grant (or decline to grant) declaratory judgment. **Torch, Inc. v. LeBlanc**, 947 F.2d 193, 194 (5th Cir. 1991). This court reviews the dismissal of a declaratory judgment action for an abuse of discretion. **Rowan Cos. v. Griffin**, 876 F.2d 26, 29 (5th Cir. 1989).

The district court may consider a variety of factors in considering whether to grant or deny declaratory relief, including the existence of a pending state court proceeding in which the issues might be fully litigated. *Id.*

Fundamentally, the district court should determine whether the state action provides an adequate vehicle for adjudicating the claims of the parties and whether the federal action serves some purpose beyond mere duplication of effort. The district court should consider denying declaratory relief to avoid gratuitous interference with the orderly and comprehensive disposition of a state court litigation if the claims of all parties can satisfactorily be adjudicated in the state court proceeding.

Matter of Magnolia Marine Transp. Co., 964 F.2d 1571, 1581 (5th Cir. 1992) (internal punctuation and citations omitted).

The pending state court action in this case encompasses the coverage issues raised by London Underwriters in this declaratory action. The appellants are parties to the pending state court action and may assert coverage defenses in that suit. The district court did not abuse its discretion in concluding that maintenance of this declaratory judgment action would result in piecemeal adjudication of the coverage dispute and would reward London Underwriters's [sic] attempts to forum shop. Accordingly, the district court's order declining to entertain this declaratory judgment action is affirmed.

AFFIRMED.
